Supreme Court, U.S.
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No.

In the Supreme Court

OF THE

United States

October Term, 1995

THE PEOPLE OF THE STATE OF CALIFORNIA AND THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,

Petitioners,

VS.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case involves Caller ID service and the propriety of the FCC's preempting California's mechanism to protect the privacy and safety of sixteen million Californians living in households with nonpublished telephone numbers.

The questions presented are:

1. Whether the FCC's preemption under the Supremacy Clause (U.S. Const., Art. VI, cl. 2) of California's mechanism to protect the privacy and safety of its citizens – a preemption which would compel the disclosure to the general public of the nonpublished home telephone numbers of millions of California citizens without their knowledge and consent starting June 1, 1996 – is permissible in light of the clear jurisdictional limitations placed on the FCC by 47 U.S.C. § 152(b)(1), the fact that the protection of general privacy rights has traditionally been left to the states, the fact that approximately 93 per cent of the affected telephone calls are intrastate in nature, and the fact that California's privacy protection mechanism does not substantially affect the FCC's regulation of interstate telecommunications.

2. Whether the FCC's preemption under the Supremacy Clause (U.S. Const., Art. VI, cl. 2) of California's mechanism to protect the privacy and safety of its citizens – a preemption which would compel the disclosure to the general public of the nonpublished home telephone numbers of millions of California citizens without their knowledge and consent starting June 1, 1996 – violates free speech and privacy rights protectable under the First, Fourth, Fifth and Ninth Amendments to the United States Constitution.

PARTIES

The proceedings below consisted of four consolidated petitions for review of the FCC's Caller ID orders, two filed by California, one by AT&T Corp. ("AT&T") and one by the Competitive Telecommunications Association ("CompTel"). AT&T and CompTel raised issues unrelated to those raised by California.

The parties participating in California's petitions were:

Petitioners
People of the State of California
Public Utilities Commission of the State of California

Intervenors Supporting California
California Alliance Against Domestic Violence
Consumer Action
Consumer Federation of America
Family Violence Prevention Fund
National Association of Regulatory Utility Commissioners
National Association of Social Workers
Pennsylvania Public Utility Commission
Southern California Coalition on Battered Women
Toward Utility Rate Normalization

Respondents
Federal Communications Commission
United States of America

Intervenors Supporting Respondents and Opposing California
GTE-California
Pacific Bell

Other Parties Not Participating in California's Petitions
Ad Hoc Telecommunications Users Committee
Ameritech Operating Companies
AT&T Corp.
Bell Atlantic Telephone Companies

PARTIES – Continued

BellSouth Corporation
Competitive Telecommunications Association
GTE Service Corporation
MCI Telecommunications Corporation
National Association of State Utility Consumer Advocates
National Telephone Cooperative Association
Southwestern Bell Telephone Company
United States Telephone Association
U S West Communications

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PETITION FOR A WRIT OF CERTIORARI

The People of the State of California and the Public Utilities Commission of the State of California ("California" or "CPUC") respectfully petition that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on January 31, 1996.

OPINIONS BELOW

The opinion of the Ninth Circuit is reported at *California v. FCC*, 75 F.3d 1350 (9th Cir. 1996), and is reproduced in the Appendix, A1-A32.[1] The challenged orders of the FCC are reported at *Report and Order and Further Notice of Proposed Rulemaking* ("*Report and Order*"), 9 FCC Rcd 1764 (1994), and *Memorandum Opinion and Order on Reconsideration, Second Report and Order and Third Notice of Proposed Rulemaking* ("*Reconsideration Order*"), 10 FCC Rcd 11700 (1995), and are reproduced at A33-A86 and A87-A175, respectively. The CPUC decision preempted in part by the FCC's orders is reported at *Re Pacific Bell*, 44 Cal.P.U.C.2d 694, 134 P.U.R.4th 184 (1992), is excerpted at A176-A253, and is lodged in its entirety with the Clerk.

JURISDICTION

The judgment of the Ninth Circuit was entered on January 31, 1996. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Supremacy Clause (Art. VI, cl. 2) of the United States Constitution, the First, Fourth, Fifth and

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[1] As herein used, numbers preceded by the letter "A" refer to pages in the appendix to this petition.

Ninth Amendments to the United States Constitution, the Declaration of Rights (Art. I, § 1) of the California Constitution, and 47 U.S.C. § 152(b)(1). These constitutional and statutory provisions are fully set forth at A342-A345.

STATEMENT OF THE CASE

A telephone customer who purchases Caller ID service is able to see the calling party's telephone number on a small screen attached to or built into the telephone, unless the caller blocks disclosure. However, because Caller ID can disclose the caller's telephone number to third parties every time a telephone call is made, it affects all telephone users, whether or not they purchase Caller ID service.

In June, 1992, after extensive evidentiary hearings, the CPUC issued a decision authorizing California telephone companies to transmit calling party numbers and to offer intrastate[2] Caller ID service. However, confronted with evidence of potential abuses of Caller ID service by telemarketers, those engaging in discriminatory "redlining" practices, domestic abusers, stalkers, and others, A190, the CPUC required that the service could only be provided with blocking mechanisms designed to protect the privacy and safety of all California citizens. *Re Pacific Bell,* A176-A253. The CPUC's blocking regime rested on the right of privacy enumerated in

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[2] Under the Communications Act of 1934, the CPUC has authority over *intrastate* common carrier communications by wire or radio and the FCC has authority over *interstate* common carrier communications by wire or radio. *See* 47 U.S.C. §§ 152(a) and 152(b)(1). So far as relevant here, the newly enacted Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (Feb. 8, 1996), does not alter this division of authority.

the California Constitution, Cal. Const., Art. I, § 1. A197-A198, A207, A212, A222, A228, A229, A343.

The privacy protections established by the CPUC included a choice of free per call blocking – which would require the caller to dial *67 before each call in order to block disclosure of the caller's telephone number – or free per line blocking – which would block disclosure of the caller's number on all calls unless the caller overrode the blocking for a particular call by first dialing *82. A211-A212.

The CPUC also concluded that the default blocking option for those customers who did not affirmatively communicate their choice to the telephone company would be per line blocking for emergency service organizations and for subscribers who pay monthly charges for nonpublished and unlisted telephone numbers,[3] and per call blocking for all other subscribers. A212-A214, A222, A229.

The default only applied to those customers who failed to communicate a choice of blocking option to the telephone company, and the CPUC provided that customers dissatisfied with their initial blocking option, whether or not obtained by default, could have one free change of blocking option,

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[3] Nonpublished numbers are not available to the general public from any source, A324-A332, A136 n. 119, and unlisted numbers are not published in telephone directories but are available from directory assistance, *id.* Approximately 99 per cent of California numbers not listed in white pages directories are nonpublished and approximately one per cent are unlisted. Pacific Bell, California's largest local exchange carrier, reports that it has 9,746,253 residential telephone lines, of which 4,724,942 are nonpublished and 58,676 are unlisted. A338-A339. Although California's per line blocking default also protects unlisted subscribers and emergency service organizations, for simplicity's sake California here addresses its argument only to nonpublished subscribers.

assuming they knew to request it. A215-A216. The CPUC also required telephone companies to conduct a vigorous customer education program to inform customers about Caller ID and how to protect their privacy. A233-A237.

Without appealing the decision, California telephone companies withheld offering the service and asked the FCC to preempt California's privacy protections and to establish per call blocking as the sole blocking option available nationally. *See, e.g.*, A143. They argued that Caller ID service would be more marketable and hence more profitable to telephone companies if fewer people blocked disclosure of their telephone numbers. *Id.* In April, 1994, the FCC issued its *Report and Order*, requiring the transmission of calling party numbers to interconnecting carriers for ultimate disclosure by the terminating carrier, A44, and providing that the only blocking option that would be available nationally would be per call blocking. A62-A64.

California petitioned for reconsideration, arguing that the FCC should establish an interstate regime which defers to the blocking regime established by the originating state, subject to minimum federal privacy standards. A119-A120. Pointing out that 48 states and the District of Columbia had already authorized Caller ID service (41 of them with some form of per line blocking), and carriers in all those jurisdictions, except for California, were already providing the service on an intrastate basis, California argued that the FCC should adopt an interstate Caller ID regime which respected regional and local differences. *Id.* It observed that its citizens were among the most privacy-conscious in the country, noting that the eleven metropolitan areas having the highest proportion of nonpublished numbers in the country were in California. A273, A278-A279. Indeed, in California's ten largest cities,

more than 60 per cent of telephone subscribers pay charges each month to have a private number that cannot be disclosed to the general public. *Id.*; A324-A332. Both in their brief and in their most recent reports to the CPUC, the telephone companies have confirmed that 50 per cent of California's 32 million citizens have nonpublished service. A337, A338-A341.

California also noted that in 1972 its citizens had, by a statewide ballot initiative, adopted the right of privacy as one of the "inalienable rights" of "all people" enumerated in the California Constitution. Cal. Const., Art. I, § 1, A197-A198, A343. In addition, California demonstrated that approximately 93 per cent of all telephone calls originating in California, and thus all calls subject to California's blocking regime, were intrastate calls, A254-A257, thereby underscoring the significance of the state's interest in establishing policies to protect its citizens.

On April 25 and 27, 1995, California responded to a number of Pacific Bell *ex parte* filings advocating FCC preemption of California's per line blocking default for nonpublished subscribers. A269-A301. California stated that "customer notice and education programs – even those as thorough and robust as the program required by the CPUC in its intrastate Caller ID decision – are unlikely to communicate information to more than 70% of a given population" and that "such programs cannot be an effective substitute for a default blocking option that will protect the privacy interests of customers who fail to receive actual notice." A283, *see also* A287-A292, A295, A299-A300, A302-A323, A336. California's statements and evidence were fully confirmed by Pacific Bell's own estimate filed with the CPUC and presented by the CPUC to the Ninth Circuit that even after completion of its

education program, from 35 to 50 per cent of its customers would be unaware of the transmission of telephone numbers for disclosure and from 60 to 75 per cent of its customers would be unaware of the ability to block disclosure. A336.

California explained that "[a] default really addresses *only* those customers who fail to receive actual notice, since all customers who do receive actual notice may be presumed to have made a choice." A283 (emphasis in original).[4] California went on:

> For these nonpublished subscribers who pay their local carrier each month for heightened privacy and fail to receive actual notice, a per call blocking default would be the same as ***no blocking option at all*** because these people – at least 2.1 million California families and likely more – will not have been informed that they must dial *67 each time they make a telephone call in order to preserve their privacy. The *only* way to protect the interests of these people is with the per line blocking [with *82 override] default established for intrastate Caller ID by California.

A283-A284 (emphasis in original).

On May 5, 1995, the FCC released its *Reconsideration Order*, A87-A175, which reaffirmed the *Report and Order*'s requirement that calling party numbers be transmitted to all interconnecting carriers for disclosure by the terminating carrier starting December 1, 1995, A96, A108, A135, but

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[4] It makes no difference what the default is if all customers are aware of disclosure and blocking, for the customer who allows the default of which she is aware to take effect has made a choice. Moreover, *informed* nonpublished customers who allow California's per line blocking default to take effect can cause their numbers to be disclosed by dialing *82 on each call and can even change to per call blocking free of charge, if they prefer. Nonpublished customers who are unaware of these options cannot.

reversed the *Report and Order*'s per-call-blocking-only regime, deferring to the blocking regimes of states that permitted per line blocking with *82 override, A133-A135. However, the FCC preempted California's per line blocking default for customers with nonpublished numbers. A135-A143. It ruled that "to accomplish per line blocking by default rather than by customer choice conflicts with our federal goals." A137, *see also* A137-A143. It also concluded that it was infeasible to have two different default rules – one for interstate calls and one for intrastate calls – and therefore concluded that its per call blocking would apply to all calls originating in California, even though some 93 per cent of those calls were intrastate. A136, A254-A257. In so ruling, the FCC refused to acknowledge California's comments and evidence, now conceded by Pacific Bell, that even with strong education efforts, millions of nonpublished subscribers will not learn of disclosure and blocking and hence, under the FCC's per call blocking default, will not be able to protect their privacy. A142-A143.

In the *Reconsideration Order*, the FCC also denied California's request for a stay of its preemption "pending court review." A143. On December 1, 1995, however, the FCC issued an order staying the transmission of calling party numbers on all calls originating in California until June 1, 1996, to allow more time for education efforts, but stating it would not entertain further stays. *Order and Fourth Notice of Proposed Rulemaking*, 10 FCC Rcd. 13796, ¶¶ 23, 25 (1995). On December 26, 1995, the Ninth Circuit denied California's request for a stay of the FCC's preemption order pending appeal as moot. *Order*, Ninth Cir. Nos. 94-70197, *et al.* (Dec. 26, 1995).

On January 31, 1996, the Ninth Circuit entered its judgment denying California's petition for review. A1-A32. Despite extensive discussion of these matters in the briefs and

pleadings and at oral argument, the Court's opinion made no mention of the CPUC's evidence and the carrier concessions that even after education programs are completed, millions of customers will be unaware of their ability to block the disclosure of their telephone numbers. It rejected California's preemption argument, concluding that the FCC had rationally found that its federal policies were negated by California's default rule. A15-A21. It rejected California's free speech arguments, concluding that the First Amendment precludes the compelled dissemination of an "ideological message" but not the compelled disclosure of personal information. A24-A26.[5] And it rejected California's federal constitutional privacy claim, concluding that the right of privacy only applies to a person's most basic decisions about family and parenthood, as well as bodily integrity, and not to personal information such as nonpublished telephone numbers. A23-A24.

This petition for a writ of certiorari follows.

REASONS FOR ALLOWANCE OF THE WRIT

Starting June 1, 1996, absent action by this Court, the home telephone numbers of millions of California citizens residing in households with nonpublished service will be transmitted for disclosure on every call they make without their knowledge or consent. While the FCC's preemption order may be a boon to telemarketers and those seeking to

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[5] The Ninth Circuit states that "the FCC's regulation does not compel disclosure of the identity of a person who exercises his or her freedom of expression." A26. However, in light of the facts that the FCC's orders *require* the transmission of calling party numbers for disclosure in the 47 states in which Caller ID service is presently deployed, that millions of customers will not be aware of the transmission of numbers and the ability to block, and that speakers on the telephone obviously engage in protected speech, California submits that the Ninth Circuit's statement is simply wrong.

develop and sell telemarketing lists to others, the desire to avoid such intrusions on the sanctity of the home is one of the primary reasons why fifty per cent of Californians pay charges every month for a nonpublished telephone number.

This is the only time the novel questions presented by this case will come before the Court. This is not a case in which the issues will ripen by consideration in lower courts nor is it one in which the Court may properly "allow the various States to serve as laboratories in which the issue receives further study before it is addressed by this Court." *McCray v. New York*, 461 U.S. 961, 963 (1983) (Stevens, J., respecting denial of certiorari). Nor is this a case in which there is, *or even could be*, a conflict between the circuits or between a circuit and a state court of last resort.[6] California is the only state in the country to have adopted a per line blocking default for nonpublished customers, and, for better or worse, the other 47 states and the District of Columbia that have authorized the provision of Caller ID service have all long ago implemented their respective blocking regimes. The issues presented here are unlikely to arise in those states or in the circuits in which they are situated. Thus the Court is unlikely to see these issues again under any circumstances and certainly will not see them again focused by the urgency of imminent implementation violating the rights of millions of people with nonpublished service. This

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[6] While the Supreme Courts of California and Washington have found a legitimate expectation of privacy in nonpublished telephone numbers, they have enforced that expectation under their respective state constitutions. *People v. Chapman*, 36 Cal. 3d 98, 105, 679 P.2d 62, 201 Cal.Rptr. 628 (1987); *State v. Butterworth*, 48 Wash.App. 152, 737 P.2d 1297, review denied, 109 Wn.2d 1004 (1987); *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986).

case must therefore be regarded as an exception to the conflict standard enumerated in U.S. Sup. Ct. R. 10(a).[7]

The Court should accordingly make its certiorari decision based on the importance of the interests involved, and here those interests are: (1) the important interest in preserving a state's authority under our federal system to protect the privacy and safety of its citizens, and (2) the important individual interests in freedom of speech and privacy.

Federalism

In this case the FCC ignored principles of federalism and swept aside with little or no analysis the considered judgment of the State of California, which established needed privacy protection for its citizens. Since California's default rule is designed to protect those nonpublished customer who are unaware of disclosure and blocking, the FCC could have narrowly tailored its preemption order to leave California's protection in place for *those* uninformed customers *only*. Instead, it trumped California's protection for millions of the state's citizens who are without the knowledge to protect themselves.

It did so in the face of this Court's clear acknowledgment that "the protection of a person's *general* right of privacy – his right to be let alone by other people – is, like the protection of his property and of his very life, left largely to the law of the individual States." *Katz v. United States*, 389 U.S. 347, 350-51 (1968) (footnotes omitted; emphasis in original). Indeed, the Ninth Circuit itself has recognized in a slightly different context that California's privacy regulation of telecommunications is permissible regulation "to protect the

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[7] Should the Court deny certiorari, the Ninth Circuit's decision will stand as a clear obstacle to other states adopting privacy protections such as California's in the future.

public health, safety and welfare." *Air Transport Ass'n v. Pub. Util. Comm'n of California*, 833 F.2d 200, 204 (9th Cir. 1987), *cert. denied*, 487 U.S. 1236 (1988). Such regulation does "not substantially affect the conduct of an efficient, nationwide telecommunications network." *Id.* at 203, *citing Aeronautical Radio, Inc. v. Air Transport Ass'n*, 102 FCC 2d 1 (1985). "Congress has indicated to the states that they may legislate to protect the privacy of telephone conversations, and that nothing in the Federal Communications Act preempts state legislation in this area." *Air Transport Ass'n*, 833 F.2d at 206, *citing Aeronautical Radio*, 102 FCC 2d at 5, 6.

This case therefore bears a marked similarity to *United States v. Lopez*, 514 U.S. ___, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995), a case decided under the Commerce Clause, because California's adoption of a mechanism to protect the privacy and safety of its citizens does not "substantially affect" the FCC's regulation of interstate telecommunications "within the scope of its congressionally delegated authority" under the Communications Act. *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986).

Indeed, in this case California's privacy protection does not significantly intrude on federal regulation of interstate telecommunications because unrebutted evidence demonstrates that approximately *93 per cent* of the affected telephone calls are intrastate in nature. A254-A257. In other contexts, the FCC has ruled under its "jurisdictional separations" procedures, 47 U.S.C. § 410(c), that the federal interest in regulating service which involves less than ten per cent interstate traffic is *de minimis*. *Decision and Order*, 4 FCC Rcd 5660 (1989), at ¶ 2, *adopting Recommended Decision and Order*, 4 FCC Rcd 1352 (1989). These facts, taken with the clear jurisdictional limitations placed on the FCC by 47 U.S.C. § 152(b)(1), *see Louisiana, supra*, 476 U.S. at 369-374, strongly suggest that California's privacy regulation

should withstand preemption under the circumstances presented. *See also* A275-A276.

It is also significant that the FCC's preemption order abrogates California's state constitutional right of privacy on which the default rule rests, *see* Cal. Const., Art. I, § 1, A143 while never explaining why federal policy requires the compelled nonconsensual disclosure to the general public of private residential telephone numbers.

Of course the FCC concluded below that it is not reasonably possible to have different default rules for interstate and intrastate telecommunications service. The FCC's attempt to utilize the ever-expanding "impossibility exception" of *Louisiana, supra,* 476 U.S. at 375 n. 4, to justify its preemption order should be found unavailing where, as above noted, the federal interest is *de minimis.* The FCC's argument to the contrary – that California's sheer volume of calls, unlike that of other states, necessitates preemption of its default mechanism – is unpersuasive. A137-A138. The volume of interstate calls *pales* when compared with the volume of *intrastate* calls to which California's default is applicable. Moreover, if the FCC's claim were correct, California would be required to make its intrastate regulation mirror FCC regulation whenever the FCC chose simply because of California's size, while smaller states would be free to regulate intrastate service consistently with their view of the public interest. Such a conclusion would stand the dual jurisdictional scheme on its head. *See Louisiana, supra,* 476 U.S. at 368-376.

The issue is certainly not without difficulty. The *Louisiana* framework was established in the context of depreciation rates. The Court therefore had no occasion to address whether a federal interest in enriching telephone companies and telemarketers was negated by a state's effort to protect the privacy and safety of its citizens. Resolving the issue would

undoubtedly require the Court to consider whether, under our federal system, state regulation in the area of public health, safety and welfare materially intrudes on legitimate FCC regulation of interstate telecommunications. To vindicate common notions of federalism as well as the state's authority to protect its citizens, the Court should grant certiorari on this important question.

Freedom of Speech

The individual rights aspect of this case – implicating free speech and privacy values long recognized by the Court – is no less important. The First Amendment protects against the coerced disclosure of private information which the speaker chooses not to reveal, creating both a right not to speak and a right to speak anonymously. " 'The essential thrust of the First Amendment is to prohibit improper restraints on the *voluntary* public expression of ideas. . . . There is necessarily . . . a concomitant freedom *not* to speak publicly, one which serves the same ultimate end as freedom of speech in its affirmative aspect.' " *Harper & Row Publishers v. Nation Enterprises,* 471 U.S. 524, 559 (1985) *quoting Estate of Hemingway v. Random House,* 23 N.Y.2d 341, 348, 244 N.E.2d 250, 255 (1968) (emphasis in original).

Although this principle has often been applied to defeat the governmentally coerced dissemination of an "ideological message," *e.g., Wooley v. Maynard,* 430 U.S. 705, 714-717 (1977), and cases there cited, the Court has also found it applicable to the coerced disclosure of factual information. *E.g., Planned Parenthood v. Casey,* 505 U.S. 833, 884 (1992) (right not to speak implicated by statute requiring disclosure of medical information); *Riley v. National Federation of the Blind,* 487 U.S. 781, 795-798 (1988) (right not to speak violated by requirement that fundraiser disclose percentage of contributions actually turned over to charity).

The compelled disclosure of personal information relating to the identity of the speaker intrudes on the speaker's "individual freedom of mind." *Wooley, supra,* 430 U.S. at 714, *quoting West Virginia Board of Education v. Barnette,* 319 U.S. 624 (1943), and *Miami Herald Publishing Co. v. Tornillo,* 418 U.S. 241 (1974). This Court has recognized that information regarding the identity of the speaker is "inextricably intertwined" with the speaker's substantive message, *Riley,* 487 U.S. at 796, and can impact the persuasiveness of the speaker's ideas, *McIntyre v. Ohio Elections Comm'n,* 514 U.S. ___, 115 S.Ct. 1511, 1517, 131 L.Ed.2d 426, 437 (1995). Here, the compelled nonconsensual disclosure of private telephone numbers identifying the speaker "burdens protected speech" and is subject to exacting First Amendment scrutiny. *Riley,* 487 U.S. at 798; *McIntyre,* 514 U.S. at ___, 115 S.Ct. at 1518-19, 131 L.Ed.2d at 439-441.

While the question here is concededly novel, the Court's decisions suggest that in the absence of a strong justification, the governmentally coerced disclosure of private information which the speaker chooses not to reveal is repugnant to the First Amendment. The Court should grant certiorari to settle this important question.

Privacy

The privacy aspect of this case is also undeniably important, for the interest involved is "the right to be let alone – the most comprehensive of rights and the right most valued by civilized men," *Olmstead v. United States,* 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). The Court's decisions suggest that that constitutional privacy values enforceable under the First, Fourth, Fifth and Ninth Amendments prohibit the government from coercing the involuntary disclosure of the nonpublished residential telephone numbers of California

citizens absent a significant, if not compelling, governmental justification.

In *Whalen v. Roe*, 429 U.S. 589, 599 (1977), and *Nixon v. Administrator of General Services*, 433 U.S. 425, 457 (1977), the Court recognized that its privacy cases have involved the protection of "the individual interest in avoiding disclosure of personal matters." It is true that both *Whalen* and *Nixon* found the privacy interest in avoiding disclosure of personal information adequately protected by statutory and regulatory "precautions . . . to prevent the unwarranted disclosure of private . . . information." *Nixon*, 433 U.S. at 458, *citing Whalen*. But here the FCC has obliterated the necessary "precaution" which California required.

The privacy interest in avoiding disclosure of personal matters was also recognized in *DOJ v. Reporters Committee*, 489 U.S. 749, 762-780 (1989). There the Court, citing *Whalen*, found the individual privacy interest in FBI rap sheets "substantial" and enforceable under the FOIA, 5 U.S.C. § 552, and the Privacy Act, 5 U.S.C. § 552a, even where portions of the information were already part of the public record. And in *DOD v. FLRA*, 510 U.S. ___, 114 S.Ct. 1006, 1015, 127 L.Ed.2d 325, 337, 338 (1994), the Court, under the same statutes but citing *Rowan v. Post Office Dept.*, 397 U.S. 728, 737 (1970), for the proposition that constitutional privacy protection is accorded to the home, found a "far from insignificant" individual privacy interest in *home addresses*, even though "home addresses often are publicly available through sources such as *telephone directories*" (emphasis added). The Court said: "An individual's interest in controlling the dissemination of information regarding personal matters does not dissolve simply because that information may be available to the public in some form." 510 U.S. at ___, 114 S.Ct. at 1015, 127 L.Ed.2d at 337.

The Fourth Amendment cases similarly protect a citizen's legitimate expectation of privacy from governmental intrusion. *Katz v. United States, supra,* 389 U.S. at 351-352, and 361 (Harlan, J., concurring). A subjective expectation of privacy is legitimate if it is "one that society is prepared to recognize as reasonable." *Katz,* 389 U.S. at 361 (Harlan, J., concurring). Under *Katz,* a citizen who pays the telephone company each month for a number which, under the applicable tariff, cannot be disclosed to the general public, has a legitimate expectation of privacy in that number enforceable under the Fourth Amendment.[8] Moreover, that expectation "cannot be wiped out 'by the simple and expedient device of its universal violation.' . . . Whatever role the subjective expectation of privacy may play in determining the extent of a constitutional right, ' . . . the [government] cannot curtail a person's right to privacy by announcing and carrying out a system of surveillance which diminishes that person's expectation.' " *People v. Chapman, supra* note 6, 36 Cal.3d at 113, *quoting Delancie v. Superior Court,* 31 Cal.3d 865, 875 n. 11, 876, 647 P.2d 830, 183 Cal.Rptr. 866 (1982). Finally, here the nonpublished customer's subjective expectation of privacy is not diminished by the FCC's issuance of its Caller ID rules because the customer California's default is intended to protect is unaware of those rules.

The privacy decisions relied on by the Ninth Circuit below are wholly inapposite. *Planned Parenthood v. Casey,*

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[8] In circumstances in which the FCC's preemption order has the effect of compelling the disclosure of a nonpublished number to a Caller ID subscriber without the knowledge and consent of the caller, there is both a "search" and a "seizure" of the nonpublished number within the meaning of the Fourth Amendment, *see Soldal v. Cook County,* 506 U.S. 56, 63 (1992), *quoting United States v. Jacobsen,* 466 U.S. 109, 113 (1984), as well as a violation of the privacy interests identified in *Katz,* 389 U.S. at 350 nn. 4-6.

supra, was a reproductive rights case, not an informational privacy case, and this Court has repeatedly distinguished the two. *Whalen, supra*, 429 U.S. at 598-99; *Nixon, supra*, 433 U.S. at 457; *Reporters Committee, supra*, 489 U.S. at 762.

Similarly, *Smith v. Maryland*, 442 U.S. 735 (1979) – the "pen register" case – has nothing whatsoever to do with the *compelled disclosure* of *nonpublished numbers* to *the general public*. *Smith* found it doubtful "that people in general entertain any actual expectation of privacy in the numbers they dial." *Id.* at 742. Here, however, we are not dealing with "people in general" but with nonpublished subscribers – people who pay the telephone company each month to assure that their private telephone numbers remain private. *Smith* also found that there was no reasonable expectation of privacy in the numbers dialed because "[a]ll telephone users realize that they must 'convey' phone numbers to the telephone company, since it is through telephone company switching equipment that their calls are completed." *Id.* Here, however, the FCC has not required the disclosure of the calling party's number merely to the telephone company but to every call recipient the nonpublished subscriber has occasion to call. Finally, *Smith* held that "even if petitioner did harbor some subjective expectation that the phone numbers he dialed would remain private, this expectation is not 'one that society is prepared to recognize as reasonable' " because "a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties." *Id.* at 743-744. Here, however, the nonpublished subscriber who is not informed about disclosure and blocking is not *voluntarily* disclosing the number to third parties. The disclosure is without the subscriber's knowledge and consent, is contrary to the tariffed prohibition on disclosure, and is accomplished at the direction of the FCC. *See also Smith*, 442 U.S. at 746-48 (Stewart, J., dissenting), 748-752 (Marshall, J., dissenting). *Smith* is plainly inapposite.

At bottom line, the FCC has concluded that its federal policy of enhancing the development and profitability of Caller ID services, to the benefit of telephone companies and telemarketers alike, justifies the unknowing and nonconsensual disclosure of the private home telephone numbers of millions of citizens. This conclusion contravenes constitutional values consistently recognized by this Court. As we enter the "Information Age" of relentless telemarketing, of readily available databases containing universal directories, customer credit profiles and other current virtual biographies, with cross-referencing software, and of the unencumbered dissemination of information on the Internet, *see, e.g., Whalen, supra,* 429 U.S. at 605; *Reporters Committee, supra,* 489 U.S. at 769-71; *White v. Davis,* 13 Cal.3d 757, 773-76, 533 P.2d 222, 120 Cal.Rptr. 94 (1975), California's authority to adopt a mechanism to preserve its citizens' control over personal information such as their nonpublished telephone numbers should be protected by this Court.

CONCLUSION

California respectfully requests that the Court issue a writ of certiorari to review the judgment of the Ninth Circuit.

Respectfully submitted,

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